No. 15,300

IN THE

United States Court of Appeals

For the Ninth Circuit

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco,

Appellant,

vs.

LAL SINGH,

Appellee.

APPELLEE'S BRIEF.

MILTON T. SIMMONS,
1210 Mills Tower, San Francisco 4, California,
Attorney for Appellee.

Subject Index

Table of Authorities Cited

Cases

Codes and Statutes

No. 15,300

IN THE

United States Court of Appeals

For the Ninth Circuit

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco,

Appellant,

vs.

LAL SINGH,

Appellee.

APPELLEE'S BRIEF.

INTRODUCTORY STATEMENT.

The facts of this case are not in dispute. They are fully discussed in the order of the District Court, dated June 21, 1956. (Tr. 50.)

The appellee is an applicant for suspension of deportation. It is conceded that he is subject to deportation and the sole issue before this Court is whether his eligibility for suspension of deportation should be determined under the provisions of the Immigration Act of 1917 (8 U.S.C. 155(c)) or the Immigration Act of 1952 (8 U.S.C. Sec. 1254 (a)(1)). To resolve the issue, it is necessary to determine whether or not the

District Court was correct in holding that under the provisions of the "Savings Clause" of the 1952 Act (8 U.S.C. 1101 footnote) the appellee's eligibility for suspension of deportation was to be considered under the 1917 Act.

STATUTES AND REGULATIONS INVOLVED.

Section 19(c), Immigration Act of 1917 (Repealed) (8 U.S.C. 155(c)):

> "In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act * * *."

Section 244(a)(1), 1952 Immigration and Nationality Act. (8 U.S.C. 1254(a)(1)):

> "(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of

an alien lawfully admitted for permanent residence, in the case of an alien who——

(1) applies to the Attorney General within five years after the effective date of this Act for suspension of deportation; last entered the United States more than two years prior to the date of enactment of this Act; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19(d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; * * *"

Section 405 (a), 1952 Immigration and Nationality Act (8 U.S.C. 1101, footnote):

"(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit,

action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as emended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

Section 101(f) 1952 Immigration and Nationality Act (8 U.S.C. 1101(f)):

"(f) For the purposes of this Act——

"No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was——

(1) a habitual drunkard;

(2) one who during such period has committed adultery;

(3) a member of one or more of the classes of persons, whether excludable or not, described in paragraphs (11), (12), and (31) of section 212(a) of this Act; or paragraphs (9), (10), and (23) of section 212(a), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of the crime of murder.

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character."

Section 156 (g), Title 8, Code of Federal Regulations, Supplement to 1940 edition (repealed), published in 6 Fed. Reg. 68:

"150.6 * * *

"(g) *Application for departure in lieu of deportation or for suspension of deportation.* At any time during the hearing the alien may give

notice that he wishes to apply * * * for suspension of deportation under the provisions of section 19 (c) of the Immigration Act of 1917, as amended."

Section 150.10, Title 8, Code of Federal Regulations, Supplement to 1940 edition (repealed), published in 7 Fed. Reg. 10515:

"150.10 *Special procedure; application by an alien prior to arrest for suspension of deportation*—(a) *Who may apply.* Any alien who believes himself to be subject to deportation and against whom deportation proceedings have not been instituted by the issuance of a warrant of arrest, as provided in Sec. 150.3 or 150.11(a) * * *"

SUMMARY OF ARGUMENT.

Appellant sums up his argument by stating that suspension of deportation is a matter of grace; that eligibility for such relief is to be determined by the statute in effect when the application is filed; that a pending application is dependent upon a "Savings Clause" in a new act to save the applicability of a repealed act and that the Court below erred in holding that the "Savings Clause" saved to the appellee the provisions of the 1917 Act, as governing his eligibility for suspension of deportation.

The exercise of discretion in granting suspension of deportation may be a matter of grace after eligibility has been determined, but appellee contends that the determination of eligibility for the exercise of such dis-

cretion is a matter of law; that such determination is made during, and as a part of, a deportation proceeding, and is therefore governed by the law which applies to the deportation proceeding itself; that the deportation proceeding (including the application for suspension of deportation) in this case was saved by the "Savings Clause" and that therefore the decision of the Court below is correct and should be sustained.

ARGUMENT.

I.

DETERMINATION OF ELIGIBILITY FOR SUSPENSION OF DEPORTATION IS NOT A MATTER OF GRACE.

Appellant fails to distinguish between the determination of eligibility for suspension of deportation and the exercise of the discretion of granting or denying such relief after eligibility has been determined. If an application for suspension of deportation is made during the course of a deportation procedure, the Special Inquiry Officer first determines whether the applicant meets the statutory requirements for such relief. These requirements are spelled out under both the 1917 Act and the present law. Under both acts, good moral character is an important requirement, but under the 1917 Act only five years of good moral character need be proven; whereas, under the 1952 Act, the requirement is seven years. If the Special Inquiry Officer determines that the applicant meets the statutory requirements for suspension of deportation, he then proceeds to determine whether, as a matter of discretion,

the application should be granted. If the applicant fails to meet the statutory requirements, the Special Inquiry Officer is powerless to exercise the discretion, no matter how strong the equities or how deserving the case may be. Consequently, when an applicant is found ineligible for suspension of deportation, a question of law is involved, not a matter of grace, and the decision of the Special Inquiry Officer is reviewable for error.

In the case at bar, the Special Inquiry Officer and the Board of Immigration Appeals held that the appellee failed to meet the statutory requirements for suspension of deportation. (Tr. 7 at P. 11; Tr. 39 at P. 43.) No exercise of discretion was involved. The Court below properly inquired into the case to determine whether the correct law was applied in determining eligibility for suspension of deportation. The decision of the District Court made it abundantly clear that exercise of discretion was not at issue and that the Service was free to exercise its discretion as it saw fit, if the correct law was applied. (Tr. 50 at P. 54.) We submit that the exercise of discretion is not at issue in this appeal.

II.

THE SAVINGS CLAUSE OF THE 1952 ACT APPLIES TO THE APPELLEE'S APPLICATION FOR SUSPENSION OF DEPORTATION AND THE 1917 ACT IS CONTINUED IN EFFECT AS TO HIS APPLICATION.

Appellant opens the first section of his argument by stating that appellee was not in any "status" or "con-

dition," nor did he have any "right in the process of acquisition" under the 1917 Act which was saved to him by the Savings Clause. Obviously, appellant has not considered the broad scope of the Savings Clause, which includes much more than a "status," "condition," or "right in process of acquisition." We quote herewith the specific portion of the Savings Clause which does apply to the case at bar, deleting all surplusage:

> Sec. 405(a): "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to * * * affect any * * * proceedings, * * * done or existing, at the time this Act shall take effect; but as to all such * * * proceedings * * * the statutes * * * repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

A warrant of arrest was issued against the appellee in 1950, thus instituting a deportation proceeding. That proceeding was saved by the Savings Clause. The Court below quite properly held that no affirmative action was needed to bring the appellee's case within the Savings Clause and that his eligibility for suspension of deportation was a matter which was saved if something relating to the deportation occurred prior to 1952. In other words, once a proceeding is started under the prior law, the entire proceeding is saved.

In the second part of his argument, the appellant states that the appellee failed to take any affirmative action to apply for suspension of deportation until after the effective date of the 1952 Act. And appellant

also argues that the last sentence of the Savings Clause, which reads:

> "An application for suspension of deportation under Section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under Section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

requires that an application for suspension be filed prior to the date of enactment in order to be saved, whether or not the deportation proceeding is saved. We cannot agree. We contend that the quoted sentence does not specifically limit the preceding part of the Savings Clause, but in fact expands its scope. *Foradis v. Brownell,* No. 13216, decided January 17, 1957, 242 F.2d 218, cited by appellant tends to support our interpretation.

In order for the Court to understand the intent of Congress in placing this last sentence in the Savings Clause, it is necessary for the Court to understand the situation which existed as to suspension of deportation cases at the time the legislation was enacted. Counsel for appellee was employed by the Immigration Service at the time as a Deportation Hearing Officer, and supplies the following information from his personal knowledge of the situation which then existed.

Suspension of deportation was first made a part of the Immigration laws in 1940, by addition of subsection (c) to Section 19 of the Act of 1917. (8 U.S.C. 155 (c).) The requlations supplementing this new provi-

sion of law provided that an alien under deportation proceedings might, *at any time during the deportation hearing,* make application for suspension of deportation. (8 C.F.R. 150.6(g).

About December 1942, the regulations were amended to provide a "short form" suspension of deportation procedure. (8 C.F.R. 150.10.) Under this regulation, an alien who believed he was in the United States unlawfully and that he was eligible for suspension of deportation, and against whom *no warrant of arrest had been issued,* might apply for suspension of deportation. Upon receipt of such an application (and when available personel permitted), an officer of the Service would advise the applicant of the necessary documents, conduct an investigation, obtain a warrant of arrest, conduct a brief examination, and if eligibility was established, recommend to the Commissioner that suspension of deportation be granted. If there was any doubt as to eligibility, the "short form" procedure was terminated, and *regular deportation* proceedings were instituted, and during the course of the hearing, the alien could apply for suspension of deportation in the same manner as any other alien under deportation proceedings.

It must be remembered that under the "short form" an alien could apply *only if no warrant had been issued.* If a warrant had been issued, he applied *only during the deportation hearing.*

After World War II, the number of applications under the "short form" procedure increased greatly. After the 1948 amendment to Section 19(c) broadened

the scope of eligibility, the Immigration Service was deluged with applications. It was not uncommon for a three- or four-year backlog to exist in some of the larger offices, such as San Francisco. These applications were set aside while available personnel were assigned to more important tasks, such as the deportation of criminals and subversives. During the last two years prior to the 1952 Act, an effort was made to clear up this arrearage of cases, but new applications continued to be filed in great numbers and when the new law was enacted, there were thousands of applications in which no warrant of arrest had been issued, nor had any other action been taken. It is our sincere belief, that Congress added the last sentence of the Savings Clause to save all such applications on file on the date of enactment, even though no proceedings had been instituted by the issuance of a warrant of arrest. Our view is consistent with the language of the last sentence which provides that an application for suspension of deportation which is pending on the date of enactment *shall be regarded as a* proceeding within the meaning of this subsection. In other words, if a timely application was filed but no proceeding was instituted, the application is regarded as a proceeding, but if a proceeding has been instituted by issuance of a warrant of arrest, the proceeding is saved and suspension of deportation may be applied for during the course of the hearing.

The appellee was not eligible to apply for suspension under the "short form" after 1950 because a warrant of arrest had been issued against him. He could,

however, apply for suspension of deportation *during the course of the deportation hearing.* In 1950, the Supreme Court held that deportation hearings must conform to the Administrative Procedures Act. (*Wong Yang Sung v. McGrath,* 339 U.S. 33.) This decision resulted in the rehearing of thousands of deportation hearings and priorities were established, whereby cases involving criminal, subversives, immoral, and similar aliens were heard first and those in which suspension of deportation seemed likely were taken last. Some cases were not heard for several years after issuance of the warrant of arrest. Hearing in the case of the appellee was not held until 1954. Consequently, he had no opportunity to apply for suspension of deportation prior to the 1952 Act even though his deportation proceeding was instituted in 1950. Must the appellee be prejudiced by reason of the Service's delay, over which he had no control? We think not. He made his application during the course of a deportation proceeding which was existing at the time the 1952 Act took effect and was entitled to have his application considered as to eligibility under the provisions of the 1917 Act. In *Miyagi v. Brownell,* 227 Fed. 2d 33, the alien was first accorded a deportation hearing in 1945, motion to reopen was granted in 1950, and in 1953, he applied for suspension of deportation during the reopened hearing. The District of Columbia Circuit held that the 1917 Act applied to the reopened proceeding and to the application for suspension of deportation. (See also *Romero-Garcia v. Barber,* No. 34639 U. S. District Court, Northern District of California, Southern Division

(not reported).) As the Supreme Court stated in *United States v. Menasche,* 348 U. S. 528:

> "The whole development of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, *manifests a well established Congressional policy not to strip aliens of advantages gained under prior laws.* The consistent broadening of the savings provision, particularly in its general terminology, *intended to apply to matters both within and without the specific contemplation of Congress."* (Italics added.)

As stated above, the 1952 Act required seven years of good moral character; whereas, the 1917 Act requires only five years. The eligibility of the appellee depends upon the section which applies because the Special Inquiry Officer and the Board of Immigration Appeals found that he had been a person of good moral character for five years, but that he could not show seven years of good moral character, because of certain misrepresentations made to Immigration officers more than five years prior to the hearing but within the seven-year period. If the 1952 Act applies, the appellee was ineligible for suspension of deportation and the Service could not exercise its discretion to grant or deny the application as a matter of grace. If, on the other hand, the 1917 Act applies, the Service having already found that the appellee met the statutory requirement of five years of good moral character, he would be found eligible for suspension of deportation and the exercise of discretion would be appropriate. Whether the appellee would be granted or

denied suspension as a matter of discretion, we, of course, do not know, but we do know that such relief was granted under the 1917 Act in a case on all fours with that of appellee (*Matter of U——*, 2 I. & N. Dec. 830).

CONCLUSION.

It is respectfully submitted that decision of the Court below should be upheld because:

1. A deportation proceeding was instituted against the appellee in 1950.

2. As to that proceeding, the 1917 Act applies by reason of the Savings Clause of the 1952 Act.

3. The application for suspension of deportation in 1954 was a part of the deportation proceeding and therefore eligibility for such relief must be determined under the 1917 Act.

Dated, San Francisco, California,
April 26, 1957.

MILTON T. SIMMONS,
Attorney for Appellee.